



Date: June 30, 1998
Case No.: 97-INA-399

In the Matter of:

GEORGINE AND THEODORE PROKOPOV
Employer,

On Behalf of:

DIMITRI PROKOPOV
Alien.

BEFORE: Lawson, Guill and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Dimitri Prokopov ("Alien"), filed by Employer Georgine and Theodore Prokopov ("Employer"), pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York, denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On August 21, 1995, Employer filed an application for labor certification to enable Alien to fill the position of Domestic Worker, Live-in. (AF11-12).

The CO issued a Notice of Findings ("NOF") on October 23, 1996, proposing to deny certification on several grounds, including that the job opportunity requires a combination of duties, that the employment was not full-time, that Alien did not have one year of prior paid work experience, and that the job duty of "aiding elderly employers" needed to be described in detail. (AF 18-20).

Employer submitted rebuttal on November 21, 1996. (AF 21-22). Employer amended the job duties to be “kitchen and laundry work, cleaning inside and outside of house, lawn mowing, snow and ice removal around the house.” (AF 22). Employer noted that both of them are elderly, retired professors who live in the Shawangunk Mountains of New York and are 12 miles from the nearest city. (AF 21). Employer asserted that the amended duties clearly indicate full-time work, but submitted no documentation. With a second letter of rebuttal dated December 2, 1996, Employer submitted an affidavit from Alien’s previous employer stating that Alien had approximately 1 ½ years experience as a “household domestic service worker performing the duties of cleaning the house inside and outside, washing windows, laundering, kitchen work, shopping and minor repairs on all appliances etc.” (AF 23). (emphasis added).

The CO issued the Final Determination (“FD”) on January 7, 1997, denying certification, because Employer failed to document the business necessity of the combination of duties and the full-time nature of the work, and because Alien did not have one year of experience in job duties of lawn mowing, snow and ice removal. (AF 25-26).

On January 21, 1997, Employer requested administrative judicial review and on June 13, 1997, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“Board”).

DISCUSSION

The CO found that the duties listed by Employer could not be placed into one job classification and required Employer to document the business necessity of having a combination of duties. In determining the DOT classification for a position, the DOT is merely a guideline and should not be applied mechanically. *See Promex Corp.*, 89-INA-331 (Sept. 12, 1990). The Board recently cited *Trilectron Industries, Inc.*, 90-INA-176 (Dec. 19, 1991) for the proposition that the DOT is not to be applied in a pigeonhole fashion where there must be a complete matching of duties between the job offered and the DOT classification in order for a job to be appropriately classified. *Mohamad Wood Turning, Inc.*, 95-INA-309 (Feb. 6, 1997). In *Mohamad Wood*, the Board noted that “virtually all the of the duties listed by Employer are included in the job description...” and therefore that was the correct classification.

In this matter, “virtually all of the job duties listed by Employer are included in the job description” of Caretaker.¹ The only duties not encompassed by this definition are “kitchen and

¹301.687-010 **CARETAKER** (domestic ser.) alternate titles: odd-job worker

Performs any combination of following duties in keeping private home clean and in good condition: Cleans and dusts furnishings, hallways, and lavatories. Beats and vacuums rugs and scrubs them with cleaning solutions. Washes windows and waxes and polishes floors. Removes and hangs draperies. Cleans and oils furnace. Shovels coal into furnace and removes ashes. Replaces light switches and repairs broken screens, latches, or doors. Paints exterior structures, such as fences, garages, and sheds. May drive family car. May mow and rake lawn. May groom and exercise pets. When duties are confined to upkeep of house,

laundry work.” The other duties of “cleaning inside and outside of house, lawn mowing, snow and ice removal around the house” are clearly encompassed in the definition of Caretaker. As the majority of duties are included in the DOT description of Caretaker, we find that the position should be properly classified as a Caretaker and that Employer was therefore not required to document the business necessity of the duties.

The CO’s second reason for denial of the application was that Employer failed to document the full-time nature of the work. The CO found that the “duties of Yardworker/Landscaping are seasonal” and that Employer did “not address what duties would be performed during the winter months.” (AF 19). As we find that the position is properly classified as a Caretaker, the CO’s concern with the full-time nature of the work is no longer relevant, and furthermore, we note that the listed duties included snow and ice removal, kitchen and laundry work, and cleaning inside the house, all of which can be performed in the winter.²

The CO’s final basis for denial is Employer’s failure to document that Alien has one year of experience in each of the listed job duties, specifically lawn mowing, snow and ice removal. (AF 25). The occupation of Caretaker is included in the category of "Household Domestic Service." This category encompasses a variety of tasks in private households, including cleaning, dusting, washing, ironing, making beds, mending clothes, cooking, serving food and caring for children. *See* § 656.11(b)(26). Household Domestic Service positions are included on "Schedule B" which lists jobs for which the Department of Labor has determined that a nationwide surplus of United States workers exists and that the employment of aliens in these positions would adversely affect the wages and working conditions of U.S. workers employed in similar occupations. *See* 20 C.F.R. § 656.23. An employer may avoid a Schedule B denial for a household domestic service worker in either of two ways, waiver or removal. By negative inference, § 656.11(b)(26) implies that if the alien establishes at least one year of documented full-time paid experience as a household domestic service worker, then the occupation is removed from the Schedule B application. *See* § 656.11(b)(26).

Employer submitted uncontested documentation which indicated that Alien had more than one year experience as a household domestic service worker. (AF 23). However, according to the CO, as the documentation did not specifically reference that Alien had experience in the listed job duties of lawn mowing, ice and snow removal, Alien did not have prior experience in all of the job duties required.

may be designated House Worker (domestic ser.).

GOE: 05.12.18 STRENGTH: M GED: R2 M1 L2 SVP: 2 DLU: 77

²Although we find that the full-time inquiry is no longer pertinent, we note that the CO reasonably requested documentation concerning this issue in the NOF, *see Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), and that Employer failed to provide any of this documentation on rebuttal and instead relied on undocumented assertions.

The requirement of documenting one year experience as a household domestic service worker is not designed to ensure that aliens have experience in each of the job duties for the position. Rather, documentation of one year previous paid experience demonstrates the alien's attachment to domestic service as an occupation, assures that the alien knows the unique demands of household domestic service workers, and suggests that the alien is likely to continue in the occupation. TAG No. 656, p.43 (Sept. 1981). Here, Alien has demonstrated a commitment to domestic service by working for 1 ½ years as a domestic service worker and by seeking employment with Employer. Therefore, the CO's requirement of documenting experience in each of the listed job duties was improper.

Additionally, we note that Alien's previous employer stated that Alien "clean[ed] the house inside and outside" and included "etc." at the end of the list of job duties. Given the location of Alien's prior employer (the former Soviet Union) and the inclusion of cleaning the house outside as a listed job duty, we find it reasonable to presume that Alien had prior experience in lawn mowing and/or ice and snow removal. Additionally, Alien's 750-B indicates that he had ten years of experience working for his father using "all handyman and gardening tools and equipment" and that he completed a course in general labor training in high school. (AF 3). Therefore, we find that Employer met the requirement of documenting Alien's one year of paid experience as a household domestic worker.

Accordingly, we find the denial of labor certification was improper based on the facts of this case. As this job offer was never approved for advertising, we cannot grant labor certification without a test of the labor market, and therefore, remand the case for advertisement and any additional action required.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this case is **REMANDED** for action consistent with this opinion.

SO ORDERED.

for the Panel:

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is

necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.